83-1668

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NO.

in the
Supreme Court
of the
United States

FRED MOSKOWITZ and CLARENCE KOLTUN,

Petitioners,

vs.

SAUL J. MORGAN ENTERPRISES, INC., and NORMAN COHEN, individually and as Trustee,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

ISSUE NO. 1

In a Sherman Act tying case, may a Plaintiff prove the element of coercion by showing an express contractual requirement by which the antitrust plaintiff's future course of action is governed and by which the antitrust plaintiff is compelled to purchase the tied product in the future only from the seller.

ISSUE NO. 2

Did the Eleventh Circuit Court of Appeals and the Trial Court err in finding that Plaintiffs did not demonstrate a sufficient showing of anti-competitive effects in the trial below by disregarding prior decisions of this Court and substituting a different standard than the one set by this Court.

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NO.

in the Supreme Court of the United States

FRED MOSKOWITZ and CLARENCE KOLTUN,

Petitioners,

vs.

SAUL J. MORGAN ENTERPRISES, INC., and NORMAN COHEN, individually and as Trustee,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Fred Moskowitz and Clarence Koltun, Plaintiffs, on behalf of themselves and all others similarly situated, petition for a writ of certiorari to review the judgment

of the United States Court of Appeals for the Eleventh Circuit, entered in this proceeding on January 27, 1984, *reh. den.*, on March 8, 1984, reported at ____ F.2d ____ (11th Cir. 1984). The Court is requested to decide whether sales by a corporate developer of millions of dollars worth of homes in the United States can be tied by express contract, to the mandatory purchase of recreational or other services or products at inflated cost which grossly exceeds the combined fair market value of the tied and tying products, when the effect of the tie is to substantially foreclose competition in the market for the tied product. The decision appears to be in direct and irreconcilable conflict with decisions of this Court.

OPINIONS BELOW

The Opinion of the Court of Appeals is to be reported at ____ F.2d ____ (11th Cir. 1984), and is annexed hereto as App. 1. The opinion of the United States District Court for the Southern District of Florida is to appear at ____ F.Supp. ____ (U.S. D.C. So.Fla. 1984) and is annexed hereto as App. 2.

JURISDICTION

The Judgment of the Court of Appeals (App. 1) was entered on January 27, 1984. A Petition for Rehearing with a Suggestion of Rehearing En Banc, was timely filed and denied on March 8, 1984 (App. 2). This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sherman Act (15 U.S.C. 1) 26 Stat. 209 as amended, which provides in part:

> "Every contract ... in restraint of trade or commerce among the several states ... is declared to be illegal ..."

Sherman Act (15 U.S.C. 2) which provides in part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states ..."

Sherman Act (15 U.S.C. 15) which provides in part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any District Court of the United States in the District in which the Defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained ..."

Sherman Act (15 U.S.C. 26) provides in part:

> "Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any Court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the Antitrust

Laws, including Sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . ."

Section 2201 of the Declaratory Judgment Act (28 U.S.C. 2201) which provides in part:

"In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought . . ."

STATEMENT

This case arose as a result of the phenomenon of residential and commercial condominium ownership which has spread across the several states. Condominium sales in the State of Florida has been explosive, due to the vast number of out of state purchasers and the seemingly unlimited availability of foreign and domestic investment funds.

In a normal situation, the purchaser of a condominium obtains fee simple title to the dwelling or commercial unit and also owns in fee simple, together with the other owners of condominiums in the project, a proportionate share of the common areas such as roadways, exterior walls, pools, tennis courts, lobbies, etc. Thus, both the proportionate share of all common elements *and* the individual dwelling or commercial unit are owned in *fee simple* by the unit owners.

However, in the case *sub judice*, as in many other cases, the situation differs, as a result of a *contractually imposed* tying arrangement.

Here, the vendor of 650 condominium dwelling units, Saul J. Morgan Enterprises, Inc., required as a condition of all purchasers of condominium units, that they also become contractually bound to a long term agreement to pay a monthly fee to a recreational business, which was owned by the corporate shareholders, Norman Cohen and Saul J. Morgan, in their individual capacity and as Trustees.

The recreational business is located on an approximately one-half acre location adjacent to the

condominium. The tie to the recreational business originally took the form of a non-exclusive 99 year leasehold but was converted later to a 30 year obligation, secured by the same 99 year non-exclusive lease.

All sales of the 650 residential condominium units at the Commodore Plaza Condominium project were initially and continue to be contractually tied to payments to the defendant(s) recreational business, whereby the unit owners and their successors are required, as a *contractual* condition of sale and continued ownership, to pay a monthly sum to the defendant(s), whether they patronize the defendant(s) recreation business or not. The condominium units are alleged to be the tying product and the unwanted recreation facilities are the tied product. At time of trial, the tied payments to the recreation business exceeded $450,000.00 per annum.

The corporate Defendant/Respondent, Saul J. Morgan Enterprises, Inc., (the name was later changed to Century 21 Commodore Plaza, Inc.), operated interstate and was engaged in the building and sale of dwelling units to purchasers in New York, Massachusetts, Florida and other States. Norman Cohen, and Saul J. Morgan, individually and as Trustees, who were also controlling stockholders of the vendor corporation, were also engaged in the recreational/leisure time activities business. Therefore, it is clear that at least *two* business categories were involved in the matter, (1) the sale of dwellings and (2) a separate recreation business.

This was an extremely large condominium project involving financing and sales in the millions of dollars, and originally planned for thousands of residential and commercial condominium units.

There were plans and advertisements for major entertainment facilities, at the project including theatres, bowling alleys, health spas, tennis courts, a luxury motel, golf course and floating restaurant, etc. as was shown by undisputed evidence at the trial below. The project was unquestionably unique.

It was also undisputed that customers for the development were to be and were in fact drawn from New York, Massachusetts and other states as well as from the State of Florida. Undisputed evidence below showed that sales efforts for this project were conducted by company representatives in New York, Massachusetts and elsewhere, although the project was located in Dade County, Florida.

Brochures and other mailings were sent through the United States mails to out of state purchasers and prospective purchasers. Interstate telephone calls were made on a regular basis.

Advertisements were placed in various nationally distributed newspapers, and magazines, including Aloft Magazine, distributed nationally by National Airlines and placed in interstate travel via airplanes to other states. Advertising also appeared in the New York Times, directed at non-Florida residents.

Economic forecasting and planning was done by firms in the states of New Jersey and Pennsylvania.

Bulk sales of condominium units for investment purposes were made to a New York corporation, 39 Cortlandt Associates, Inc., for a sum in excess of $1,000,000.00. Sales of individual dwelling units to out

of state buyers and Floridians exceeded Twenty Million ($20,000,000.00) Dollars. Millions of dollars in construction materials and monies were shown to have moved interstate.

The controlling documents evidencing the tying arrangement were signed, in part, in New York and sent to Florida. Norman Cohen, respondent, was a New York resident at the time.

The recreational business, at time of trial, was billing in excess of Four Hundred Fifty Thousand ($450,000.00) Dollars per year to the owners of the "tied" condominium dwellings. By its terms, the tying agreement had required payment of millions of dollars prior to the time of trial and thereafter.

In short, the undisputed evidence showed that the projects involved in the case *sub judice* encompassed substantial monies and interstate activities in both the sales of dwellings by the defendant(s) and the tied recreational businesses owned by the defendant(s). The total value of the "tied" recreational business was less than $100,000.00. Expert testimony showed that a competitive charge for the facilities would be less than $15,000.00 per year in a free market. Thus more than $400,000.00 in business was foreclosed to competitors each year and continues to be foreclosed.

The case seeking relief from the tying arrangement was originally filed in 1974 by Commodore Plaza At Century 21 Condominium Association, Inc. the corporate Condominium Association, which managed the affairs of the condominium, and acted as representative of the unit owners after the developing corporation, a defendant

herein, relinquished control of the condominium's affairs. It was also the nominal "lessee" on the tying contract, having been designated as such when the individual defendants controlled its affairs.

However, due to the decision in *Spitz, et al. vs. Buchwald, et al.*, 550 F.2d 1051 (5th Cir. 1977), the Trial Court determined that the corporate Condominium Association was not the proper party plaintiff, whereupon petitioners Moskowitz and Koltun, two of the Condominium owners suffering from the tying arrangement were permitted to proceed as plaintiffs. Class status was sought and denied, it is thought erroneously.

The case came to issue and was tried before a jury. The jury returned a verdict in favor of the Plaintiffs and awarded damages, finding, *inter alia*, that an illegal tie was proved and a *per se* violation of the Sherman Act had been proved.

The defendants moved for entry of Judgment N.O.V., which the Court granted, by summary Order, listing four reasons for its decision (App. 2). The Court stated that:

> 1. Plaintiffs failed to elicit the requisite proof on the existance of two distinct products and any finding of two distinct products implicit in the general verdict is contrary to the great weight of the evidence.
>
> 2. Plaintiffs failed to prove the existance of sufficient economic power in the tying market to coerce purchase of the tied product.

3. Plaintiffs failed to demonstrate any anticompetitive effect on any market.

4. The great weight of the evidence is to the effect that Plaintiffs were unable to establish a "not insubstantial amount of interstate commerce in the market insofar as they failed to prove the existance of the tied market which might be affected, i.e. the great weight of the evidence was that there was no tied market.

The court also granted a new trial in the event of reversal by the Appellate Court of the Judgment N.O.V. for the stated reason that, in the view of the Court, there was a lack of competent evidence to support the damages awarded by the jury and this in and of itself was sufficient to order a new trial (App. 2). The jury had awarded plaintiffs damages equal to what they had paid and would be required to pay as a result of the tie.

On appeal, the Eleventh Circuit Court of Appeals affirmed (App. 1) Judges Hill, Hatchett and Allgood (U. S. District Judge of the Northern District of Alabama, sitting by designation) comprising the panel. Rehearing en banc was requested and denied. (App. 3)

The appellate Court reasoned that plaintiffs failed to make any showing of coercion or anticompetitive effects and reasoned the fact finder cannot infer coercion or effect from the existance of a tie-in as Plaintiffs apparently contend (sic), citing *United States Steel Corp. vs. Fortner Enterprises*, 429 U.S. 610, 617-18 (1977) (Fortner II): *App. 2.*

"It is thus clear that the District Judge properly entered judgment N.O.V. and we therefore need not address Moskowitz and Koltun's contention that the Judge erred in entering judgment on the other grounds set forth."

Petitioners are of the view that the jury was correct in finding for plaintiffs and that the learned Trial Judge, and Appellate Judges were incorrect in determining that the tying arrangement demonstrated is not prohibited by the Sherman Act. The decision appears to be in direct conflict with the decisions of this Court.

ARGUMENT

ISSUE NO. 1

In a Sherman Act tying case, may a Plaintiff prove the element of coercion by showing an express contractual requirement by which the antitrust plaintiff's future course of action is governed and by which the antitrust plaintiff is compelled to purchase the tied product in the future only from the seller.

It is undisputed in the case *sub judice* that each and every of the 650 purchasers of dwelling units at the Commodore Plaza Condominium were required, *contractually*, to pay a monthly charge to the defendants recreation business *whether they patronized it or not*, as a condition of purchasing and owning a condominium dwelling unit. The total yearly cost to the putative class of owners exceeded $450,000.00 at the time of trial, in excess of a million dollars prior to the trial and

would require millions of dollars to be paid thereafter at the rate of $450,000.00 per year.

It is undisputed in the record below that recorded documents clearly showed this *contractual* requirement and that no exceptions were made from the tie as to any purchaser.

The evidence was undisputed that the *contractual* tying arrangement gives the owner of the recreational business a lien upon each purchaser's dwelling unit in order to enforce the monthly payments to the owner of the tied recreational business. This is in addition to other contractual coercions to enforce payment.

Thus, the future course of action of the purchaser/owner is limited and controlled by the *express contracts* and coercion which is found in the tying agreement itself as well as respondents' conduct.

The tying contracts also provide for *punitive* measures against the homeowner for non-compliance with the tying contract, ranging from loss of the dwelling, damages, and fines. The proofs showed the course of dealings of the defendants as well as the express contractual tying arrangement.

The Supreme Court of the United States has held that where one product is sold on the express contractual condition that the purchaser purchase another product in the future from the seller or at his direction, the purchaser's future course of action is limited by that contract, and coercion is found in the agreement itself. *Northern Pacific Railway Company vs. United States*, 356 U.S. 1, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958), See

also: *Advance Business Systems and Supplies Company vs. SCM Corp.*, 415 F.2d 55 (4th Cir. 1969), cited with approval in *Response of Carolina, Inc. vs. Leasco Response, Inc.*, 537 F.2d 1307 (5th Cir. 1976) at 1328; *Carpa, Inc. vs. Ward*, 536 F.2d 39 (5th Cir. 1976).

The decision *sub judice* is in direct conflict with *Northern Pacific, supra* and *International Salt Co. vs. United States*, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed.2d. The Eleventh Circuit has substituted a *different* test.

The *Fifth* Circuit treated this question in *Buckley Towers Condominium, Inc., et al. vs. Herbert Buchwald, et al.*, 533 F.2d 934 (5th Cir. 1976) *at 938*, (Dyer, Simpson and Fay presiding), an earlier condominium tying case, concerning *standing* to sue, wherein the Court stated that the District Court below had "correctly noted that the tied product is a recreational facility and the obligation to make rental payments on these facilities, and the tying products are the residential condominium units . . .". *Buckley Towers Condominium, Inc. vs. Buchwald, supra.* The recreational tying arrangement recited in *Buckley, supra* is similar to the one here. The *Eleventh* Circuit has apparently rejected the reasoning in *Buckley Towers, supra.*

The evil to our competitive economic system and foreclosure of substantial markets to competition is demonstrated by the conduct proved at the trial in the case *sub judice*, but sanctioned by the Eleventh Circuit.

When a person cannot buy or continue to own a home without being contractually required to sign a 99 year contract to pay exhorbitant and increasing monthly charges to the owner of a recreation business at an

inflated price, this should, in and of itself, be evidence of express contractual coercion. *Northern Pacific Railway, supra, International Salt, supra.*

In addition, where it is undisputed that the owner of the tied recreational business can utilize punitive measures, including exercising collateral liens permitting foreclosure of the victims home to enforce payment in the sum of $450,000.00 per year for the unwanted tied product, this too conclusively demonstrates coercion in the context of a per se antitrust violation and foreclosure of competition.

Respectfully, the District Court and the Eleventh Circuit Court of Appeals erred significantly in this regard and disregarded both the jury's factual findings and decisions of this Court and other Circuits as to proof of coercion for antitrust purposes.

ISSUE NO. 2

> Did the Eleventh Circuit Court of Appeals and the Trial Court err in finding that Plaintiffs did not demonstrate a sufficient showing of anti-competitive effects in the trial below by disregarding prior decisions of this Court and substituting a different standard than the one set by this Court.

Respectfully, the decision of the Eleventh Circuit Court of Appeals and the trial Court conflict irreconcilably with prior and recent decisions of the Supreme Court of the United States and other circuits on the issue of the required showing of anti-competitive effects.

The Supreme Court has held in *McClain vs. Real Estate Board of New Orleans, Inc.*, 100 S. Ct. 502 (1980) that a Sherman Act violation may be found in a civil action under the Sherman Act and liability established by the proof of either an unlawful purpose or an anti-competitive effect, citing *United States vs. United States Gypsum Company*, 98 S.Ct. 2864, 438 U.S. 422, 57 L.Ed.2d 854 (1978).

Petitioners presented proof below, including, but not limited to expert witness testimony, that millions of dollars in business was foreclosed to competitors of the tied recreation business as a result of the tying arrangement and that the seller of the dwelling units had sufficient economic power, with respect to the tying product (dwellings) to appreciably restrain free competition in the market for the tied product (recreation facilities). The jury was presented proofs on these points and found that the required standard of proof on this issue had been met. It also found that the tying company had a vested interest in the continuance of the tying arrangement. Pattern instructions were used and a general verdict was returned.

It was also shown that millions of dollars flowed *in commerce* as a result of the tying arrangement, and revenues in excess of $450,000.00 per year are foreclosed from competitors each year.

Additionally, construction materials in the millions of dollars moved in interstate commerce, people themselves travelled from other states to execute the coercive contracts, advertisements were utilized in national publications.

The Supreme Court of the United States has held that it is unreasonable *per se* by use of a tying arrangement to foreclose competitors from any substantial market. *Northern Pacific Railway, supra.* In *Northern Pacific* is was noted by reference to *International Salt, supra,* that it was not necessary to establish that equivalent (machines) were unobtainable nor was it necessary to show what *proportion* of the market was controlled by the Defendant, and it was irrelevant that there was no evidence as to the *actual effect* of the tying clauses upon competition. *Northern Pacific Railway, supra at 520.* See also: *Standard Oil of California and Standard Stations vs. United States,* 337 U.S. 293, 305, 69 S.Ct. 1051, 1058, 93 L. Ed. 1371.

In the case sub judice, it was shown that millions of dollars in total business was foreclosed to competitors by virtue of the tying arrangement and, it was shown that the activities of the defendants occured *in commerce* and it was shown that the Seller of the tying products had sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product. Expert and other testimony also clearly showed that payment for both the tied and tying products exceeded by far, their combined fair market value. An enormous overcharge for the complete "package" price of the two products was proved to and found by the jury. It was proved that alternatives to the tied product were available at vastly lower cost but could not be utilized, due to the restraint imposed by the express contractual tie and foreclosure of competition.

Disregarding the jury verdict in favor of Plantiffs, the Trial and Appellate Judges found that $450,000.00

per annum in dollar volume foreclosed to competitors was not sufficient to appreciably affect commerce.

It was conclusively shown that the value of the tied recreational facilities *in toto*, did not exceed $15,000.00 yearly and the *combined* value of both the individual homes and the "tied" recreational facilities were far less than the total artificially inflated cost to the plaintiffs and the other homeowners subjected to the tie.

The case is of some importance since, like *McClain*, *supra*, and *Goldfarb*, it involves the purchase of a necessity of life, a dwelling, but involves far more pernicious effects.

People in America can expect, as a minimum, the opportunity to purchase a home in which to reside at a competitive cost and a free market for leisure time recreational facilities.

Traditionally, home purchases have been both regulated and encouraged by Congress and it has been found to be a desirable goal of our economic system.

Here, it is undisputed that 650 dwellings at a multimillion dollar complex were sold *only* upon the express contractual provision that the home purchasers also agree by virtue of the sales contract and incorporated ancillary agreement, to become unwilling patrons and subsidizers of a tied recreation business, at a total cost far in excess of the combined value of the "tied package". The jury found the two products to be separate and distinct products.

There have been a number of condominium cases which have attempted to present these issues for determination. See: *Chatham Condominium Association vs. Century Village, Inc., et al.*, 597 F.2d 1002 (5th Cir. 1979), *Buckley Towers Condominium, Inc. vs. Buchwald*, 533 F.2d 934 (5th Cir. 1976), cert. den. 429 U.S. 1121, 97 S.Ct. 1157, 51 L.Ed. 2d 571 (1977), *Spitz vs. Buchwald, et al.*, 551 F.2d 1051 (5th Cir. 1977), *Imperial Point Colonnades Condominium, Inc. vs Mangurian, et al.*, 549 F.2d 1029 (5th Cir. 1977), *Miller vs. Granados*, 529 F.2d 393 (5th Cir. 1976), *Burleigh House Condominium, et al. vs. Buchwald, et al.*, 546 F.2d 57 (5th Cir. 1977).

The case *sub judice* appears to be the first case which was permitted to proceed to jury trial and it resulted in a clear jury verdict in favor of the Plaintiffs, finding the tying arrangement to constitute a *per se* violation of the federal antitrust laws.

It is quite appropriate and extremely important that this Court grant certiorari to permit full briefing on the issues to explore the practice of tying unwanted products or services to the sale of residential dwellings.

Such arrangements foreclose millions of dollars in business to competitors, and require home purchasers to pay far in excess of the *combined* fair market value of both products.

If such arrangements are permissible under the antitrust laws of the United States, then the standard for *per se* violations applied to other segments of our economy are not applicable to the home building industry and may erode per se standards in other industries as

well, in clear disregard of *precedent* in this Court, as is argued here.

On the other hand, if as the Eleventh Circuit appears to indicate this Court has *receded* from its pronouncements and rationale in *Northern Pacific, supra, Goldfarb vs. Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) and *McClain, et al. vs. Real Estate Board of New Orleans, supra,* then this Court should issue a determinative opinion delineating the applicable standards in this area of antitrust law.

If these tying practices are permissible, then the era of affordable housing in America is now at an end, both for the reason that unrelated products or services can be tied to the sale of the home at highly inflated cost, exceeding the combined value of the "package". Competition is also inevitably affected and foreclosed for the reason that the tying device can now be utilized to avoid federal and state regulation of mortgage financing, and can artificially obscure the true cost of both homes and financing of homes, and competitors in the market for the tied products are foreclosed from substantial markets as a result of the tie.

The Court should exercise discretion in favor of granting the Writ.

CONCLUSION

There should be no question that the matters concerned in this petition are of great public interest and involve significant restraints upon commerce. It would also appear that the decisions below depart drastically from settled principles of *per se* antitrust law as announced by this Court.

The Eleventh Circuit's apparent rejection of this Court's previous decisions in *Northern Pacific Railway, McClain,* and *Goldfarb vs. Virginia State Bar,* would appear to be compelling reason for the granting the Writ.

Respectfully, Petitioners Writ of Certiorari should be granted.

Respectfully submitted:

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By: /s/ J. S. Paglino
Joseph S. Paglino, Esq.

CERTIFICATION

IT IS HEREBY CERTIFIED that a true copy of the foregoing was mailed this 11th day of April, 1984 to Gerald F. Richman, Esq., Floyd Pearson, et al., 25th Floor One Biscayne Tower, Miami, Florida 33131, Counsel for Respondents.

By: /s/ J. S. Paglino
Joseph S. Paglino, Esq.
Counsel for Petitioners

Appendix

APPENDIX

App. 1—Opinion of the Eleventh Circuit Court of Appeals dated January 27, 1984

App. 2—Order Granting Judgment Notwithstanding the Verdict or, in the Alternative Granting New Trial

App. 3—Order of the Eleventh Circuit Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing En Banc dated March 8, 1984

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 82-5832

COMMODORE PLAZA AT CENTURY 21
CONDOMINIUM ASSOCIATION, INC., et al.,

Plaintiffs,

FRED MOSKOWITZ, CLARENCE KOLTUN,

Plaintiffs-Appellants,

versus

SAUL J. MORGAN ENTERPRISES, INC., et al., etc.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

(January 27, 1984)

Before HILL and HATCHETT, Circuit Judges, and ALLGOOD*, District Judge.

PER CURIAM:

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*Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

Plaintiffs Fred Moskowitz and Clarence Koltun appeal from the order of the district court granting judgment n.o.v. to the defendants in this case. Moskowitz and Koltun also challenge the order of the district court refusing to certify their lawsuit as a class action. We hold that the district court properly resolved both issues and affirm.

This case presents a factual situation similar to one the predecessor to this court encountered in *Chatham Condominium Associations v. Century Village, Inc.*, 597 F.2d 1002 (5th Cir. 1979). In both cases, the plaintiffs alleged that condominium vendors violated the antitrust prohibition against tying arrangements by requiring purchasers of condominiums to lease an individual interest in common areas in connection with their purchase. This case differs from *Chatham*, however. In *Chatham* we reviewed an order dismissing the case for lack of jurisdiction; here we review an order granting judgment n.o.v.

In issuing his order, the district judge held that Moskowitz and Koltun failed to: (1) prove the existence of two legally cognizable separate and distinct products; (2) prove that defendants possessed economic power in the tying product market; (3) prove anticompetive effects; and (4) prove an effect on interstate commerce. In order to establish the existence of an illegal tying arrangement, each element (and others) must be shown by the plaintiff. *See Driskill v. Dallas Cowboys Football Club, Inc.*, 498 F.2d 321 (5th Cir. 1974). In this case, as in *Driskill*, the plaintiffs failed to make any showing of coercion or anticompetive effects, *see id.* at 323, and the factfinder cannot infer coercion or effect from the

existence of a tie-in, as plaintiffs apparently contend, *United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610, 617-18 (1977) (*Fortner* II). It is thus clear that the district judge properly entered judgment n.o.v. and we therefore need not address Moskowitz' and Koltun's contentions that the judge erred in entering judgment on the other grounds set forth.

We also find no error in the judge's order denying class certification. The judgment is

AFFIRMED.

[Rec'd 7-1-82]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 74-570-Civ-JWK

FRED MOSKOWITZ and CLARENCE KOLTUN,

Plaintiffs,

vs.

SAUL J. MORGAN ENTERPRISES, INC., et. al.,

Defendants.

ORDER GRANTING JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE GRANTING NEW TRIAL

This cause came on to be heard on defendants' motion for judgment notwithstanding the verdict and to order judgment for defendants in accordance with defendants' previous motion for directed verdict or, in the alternative, for a new trial. The court having carefully reviewed the file and the extensive memoranda filed by the parties, and being otherwise duly advised in the premises, it is

ORDERED AND ADJUDGED that the verdict for plaintiffs be and the same is hereby set aside and that judgment be and the same is hereby entered in favor of defendants on the grounds that the verdict is contrary to the great weight of the evidence and that

the facts and inferences point so strongly in favor of defendants that the court believes that reasonable persons could not arrive at a verdict for plaintiffs. See, e.g., *Conway v. Chemical Seaman Tank Lines*, 610 F.2d 360 (5th Cir. 1980); *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969). Specifically, the court finds:

1. Plaintiffs failed to elicit the requisite proof on the existence of two distinct products and any finding of two distinct products implicit in the general verdict is contrary to the great weight of the evidence.

Plaintiffs contended that certain portions of the lower and smaller of two pool decks at Commodore Plaza Condominium (Commodore) which was subject to a 99 year lease constituted a separate and distinct product from the purchase of a condominium unit together with a prorata share of the common elements at Commodore which common elements included a much larger pool, pool deck, and other facilities.

Plaintiffs at trial suggested that the leased portion of the facilities was merely excess and surplusage in light of the other substantial facilities that were part of the common elements. Plaintiffs' experts testified that there is no competing market for the leased area. The great weight of the evidence demonstrated that as to the leased area any meaningful connection to recreation was little more than pleasantly coicidental to defendants and was irrelevant to plaintiffs. *Levinson v. Maison Grande, Inc.*, 517 F.Supp. 963 (S.D. Fla. 1981) (appeal pending). Those items which were made subject to the lease, i.e., the smaller of two swimming pools, a divided covered area, one portion of which is on land subject to the lease while the remainder is on land owned in fee

by the unit owners, and a small putting green, do not constitute a product separate and distinct from the condominium units themselves or from a condominium leisure living package. Further, the items subject to the lease do not render the leased area a "club." *Chatham Condominium Association v. Century Village, Inc.*, 597 F.2d 1002 (5th Cir. 1979).

2. Plaintiffs failed to prove the existence of sufficient economic power in the tying marking to coerce purchase of the tied product. The alleged tie-in arrangement neither foreclosed the typing party's competitors from a segment of the tied product market nor did it deprive the alleged tie's victims of the advantages of shopping around. Thus the arrangement exhibits neither of the two principal evils of tie-in arrangements. *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368 (5th Cir. 1977).

The great weight of the evidence was clearly to the effect that the markets for condominium units in the North Dade area or the Dade, Broward, and Palm Beach County areas were highly competitive and that the requisite economic power or dominance was not possessed by defendant in any relevant market. See, e.g., *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977); and *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419 (5th Cir. 1978).

3. Plaintiffs failed to demonstrate any anti-competitive on any market. Plaintiffs' experts conceded at trial that the portion of the facilities subject to the lease at Commodore was not in competition with any

other such facilities and that no competitor was foreclosed in the relevant market area by the imposition of the lease in this case. Under the circumstances, there was virtually no effect, anti-competitive or otherwise, on any market. There was no evidence of any buyers forced to forego free choice between competing products. See, e.g., *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958).

4. The great weight of the evidence is to the effect that plaintiffs were unable to establish a "not insubstantial" amount of interstate commerce in the tied market insofar as they failed to prove the existence of a tied market which might be so effected, i.e., the great weight of the evidence was that there was no tied market.

With regard to defendants' motion for new trial, the court finds that the verdict is against the clear weight of the evidence with regard to all of the issues discussed above. See, e.g., *Weyerhauser Co. v. Bucon Construction Co.*, 430 F.2d 869 (5th Cir. 1967). Additionally, the court finds that the jury's award of damages was without basis in law or fact. The lack of competent evidence to support the damages awarded by the jury is sufficient cause to order a new trial. See, e.g., *Richardson v. Communication Workers of America, AFL-CIO*, 530 F.2d 126 (5th Cir. 1976).

Accordingly, it is further

ORDERED AND ADJUDGED that defendants' motion for new trial be and the same is hereby granted, this ruling granting defendants' motion for new trial to

take effect *only* in the event that the ruling of the court on defendant's motion for judgment notwithstanding the verdict is reversed on appeal.

It is further

ORDERED AND ADJUDGED that this court retain jurisdiction to award costs to defendants in an amount to be determined by the court upon proper motion.

DONE AND ORDERED in chambers at Miami, Florida, this 25th day of June, 1982.

/s/ James W. Kehoe

JAMES W. KEHOE
UNITED STATES DISTRICT JUDGE

CC: All Counsel

[FILED MAR 8 1984]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5832

COMMODORE PLAZA AT CENTURY 21
CONDOMINIUM ASSOCIATION, INC., ET AL,

Plaintiffs,

FRED MOSKOWITZ, CLARENCE KOLTUN,

Plaintiffs-Appellants,

versus

SAUL J. MORGAN ENTERPRISES, INC.,
ET AL., ETC.,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Florida

**ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC**

(Opinion JANUARY 27, 11 Cir., 1984, ____ F.2d ____).

(MAR 8 1984)

Before HILL, HATCHETT, Circuit Judges, and
ALLGOOD*, District Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ JAMES C. HILL
United States Circuit Judge

*HON. Clarence Allgood, U.S. District Judge, for the Northern District of Alabama, sitting by designation

United States Court of Appeals
For the Eleventh Circuit

No. 82-5832

D.C. Docket No. 74-00570

COMMODORE PLAZA AT CENTURY 21 CONDOMINIUM ASSOCIATION, INC., et al,

Plaintiffs,

FRED MOSKOWITZ, CLARENCE KOLTUN,

Plaintiffs-Appellants,

versus

SAUL J. MORGAN ENTERPRISES, INC., etc., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

Before HILL and HATCHETT, Circuit Judges, and ALLGOOD*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for

*Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: January 27, 1984
For the Court: Spencer D. Mercer, Clerk

ISSUED AS MANDATE:
By: /s/ [illegible]
Deputy Clerk

Office - Supreme Court, U.S.
FILED
MAY 11 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1668

In the Supreme Court of the United States

October Term, 1983

FRED MOSKOWITZ and CLARENCE KOLTUN,
Petitioners,

vs.

SAUL J. MORGAN ENTERPRISES, INC., and NORMAN COHEN, individually and as Trustee,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Did the Appellate Court err in observing that Petitioners failed in their proof of a tying arrangement claim where Petitioners failed to demonstrate the mere existence of a tied product market or of any anticompetitive effects on any market as a result of the purchase of a condominium unit with recreational facilities where an insignificant portion of those facilities required monthly payments pursuant to a lease?

2. Did the Appellate Court err in finding that a showing of coercion as it relates to sufficiency of economic power is not demonstrated by the requirement that a purchaser of a condominium unit with recreational facilities also make monthly payments pursuant to a lease on an insignificant portion of those facilities?

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Argument—

I. The Appellate Court Did Not Err in Finding That Petitioners Failed in Their Proof of a Tying Arrangement Claim Where Petitioners Failed to Demonstrate the Mere Existence of a Tied Product Market or of Any Anticompetitive Effects on Any Market As a Result of the Purchase of a Condominium Unit With Recreational Facilities Where an Insignificant Portion of Those Facilities Required Payments Pursuant to a Lease 15

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OPINIONS AND JUDGMENTS BELOW

The Order and Judgment of the United States District Court for the Southern District of Florida is annexed hereto at App. 1 and will not be published. The Opinion of the United States Court of Appeals for the Eleventh Circuit is annexed hereto at App. 2 and will not be published. The Judgment of the United States Court of Appeals for the Eleventh Circuit is annexed hereto at App. 3. The denial of Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc by the United States Court of Appeals for the Eleventh Circuit is annexed hereto as App. 4.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition Below

This matter was originally filed on May 3, 1974. The Plaintiffs at that time were the Commodore Plaza at Century 21 Condominium Association, Inc., Fred Moskowitz and Clarence Koltun.

On December 31, 1979 the Condominium Association purchased a long-term lease from the Lessors and settled all litigation between them. The litigation essentially involved an allegation that the purchase of a condominium unit in a complex containing substantial recreation facilities wherein the purchasers with undisputed full disclosures also incurred certain obligations under a long-term lease somehow constituted an unlawful tie-in. The Settle-

ment Agreement was signed on behalf of the Condominium Association by its President at that time, Petitioner MOSKOWITZ. Notwithstanding the Settlement and Purchase Agreement, Petitioners MOSKOWITZ and KOLTUN proceeded with this action individually. The trial court denied Petitioners' application for class certification after a full evidentiary hearing on August 27, 1981.

The trial of this matter was held the week of January 25, 1982. At the close of all the evidence, the trial judge who stated he had "serious reservations about the sufficiency of the evidence" reserved ruling on Defendants' motion for a directed verdict and submitted the case to the jury (T. 773). A general verdict was returned by the jury in favor of Petitioners. Thereafter, the Court granted Respondents' motion for judgment notwithstanding the verdict and, alternatively, for a new trial on all grounds enumerated by the Court in entering judgment n.o.v. and additionally on the ground that there was a lack of competent evidence to support damages. Petitioners appealed from that order entered on June 25, 1982. The United States Court of Appeals for the Eleventh Circuit after oral argument unanimously affirmed the trial court (App. 2) and denied Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc (App. 4).

All emphasis is ours unless otherwise indicated. All references to testimony at trial are abbreviated as "T. ....." and all pages on which such testimony appears are annexed hereto in chronological order beginning at App. 5.

2. Background

The Commodore Plaza Condominium is located on Biscayne Boulevard and 183rd Street in North Miami Beach, Florida, an area surrounded with condominium developments and recreational facilities. The Condominium

has two buildings consisting of 654 dwelling units as well as a complement of recreational facilities including an auditorium, card rooms, a large pool, a smaller pool, tennis courts, sun bathing areas, a shuffleboard court, a putting green, boat docks, walkways and a gazebo comprising in excess of eight and one-half acres. A relatively insignificant number of these items are located on premises which, until December, 1979, were subject to a 99 year lease. The vast majority of the recreational facilities were located on areas commonly owned by the unit owners in fee simple and never have been subject to a lease of any kind.

On December 31, 1979 the Condominium Association settled and resolved all litigation with the Lessors (including this suit in which it had been a Plaintiff) and purchased the portion of the premises formerly subject to the lease. Notwithstanding this settlement which was executed by Petitioner MOSKOWITZ in his capacity as President of the Condominium Association, Petitioners refused to relinquish their standing in this suit. Obviously, the Condominium Association could not force Petitioners to settle. All they could do was to offer their support and good faith efforts to cooperate in the defense of this suit by the Developers which they did.

3. **The Formerly Leased Premises**
(The "Tied Product")

The formerly leased premise comprises .46 acres (T. 75) and contains a small pool, a portion of a gazebo, consisting of four posts (two of which rest within the formerly leased premises and two of which are located on common elements) and a green carpet used as a putting green (T. 78). Mr. Birnholz, Petitioners' expert appraiser, testified that there was no outside access to the leased area except

for a walkway across the common elements or by boat (T. 95). Mr. Birnholz also indicated that water access to the premises was unimportant (T. 101-102).

Immediately surrounding this area are several acres of recreational facilities which include tennis courts, shuffleboard courts, a much larger pool, sun bathing area and boat docks (T. 110), all for the use of the unit owners.

Birnholz admitted that he would ordinarily appraise a condominium unit together with all of its facilities if all of the recreational facilities were under the recreation lease (T. 108-109). Petitioners' economist, Parra, testified as follows:

> Q. Now, with respect to the particular facility of Commodore Plaza, from the standpoint of view of the purchaser at Commodore Plaza, would it make any difference at all to the purchase economically—*we are talking about real estate economics—any difference at all to the purchaser if all of the recreational facilities of Commodore Plaza were under the lease or if only one small swimming pool is under the lease where he is paying the same price for his purchase—for his apartment, rather, and he is paying the same amount monthly on his lease? Any difference?*
>
> • • •
>
> Q. I'm asking you a hypothetical question, sir.
>
> A. *No.*

(T. 589-590).

There is no question but that the portion of the recreation facilities that was carved out and made subject to

the former lease in this case constituted a "package." Birnholz admitted:

> Q. —let's assume this is Commodore Plaza. Now, it wouldn't make one bit of difference in your ultimate appraisal, sir, if that portion, this entire portion is a leased facility, a ninety-nine year lease as opposed to whether all of it were in fee simple?
>
> All of the recreation facilities, I am asking you to assume are right in here.
>
> * * *
>
> THE WITNESS: *If all of the leased facilities were under the same control, yes, I would consider it as one unit package.*

(T. 111).

Indeed, the unrefuted testimony in the record is that when Petitioners bought their condominiums, all of the recreation facilities were under the same control for all practical purposes. In 1969 the controlling principals of the developer corporation, lessor and lessee association were COHEN and MORGAN; in May of 1972 it was COHEN as to all three.

4. The Tying Product Market

Mr. Moskowitz purchased his unit in April of 1972, Mr. Koltun in 1969. Toward the end of 1969 the construction of Commodore Plaza was beset with strikes, contractual problems, poor sales and labor increases (T. 355). Competition in the sales of condominiums in the tri-county area comprising Dade, Broward and Palm Beach counties of Florida was fierce during that period and was characterized by financial failures and abandoned purchase deposits.

It was in that context that prices were set for purchasers. Increasing the cost of a condominium unit at Commodore Plaza to compensate for not having recreation lease income would have made Commodore Plaza less competitive with its neighbors (T. 635-636).

The sale and construction aspect of Commodore Plaza resulted in a 4.2 million dollar loss to the developers (T. 748). Respondent COHEN's undisputed testimony was that in terms of the developers' pricing of the condominium units and pricing of the recreation lease, the portion of land attributable to the lease was irrelevant (T. 474). In fact, without a lease the same condominium units would have sold for 15 percent more (T. 394). First Federal Savings and Loan Association of Miami which had invested heavily in Commodore Plaza was very fearful of the market condition (T. 504).

Petitioners' expert testified as follows:

* * *

> Mr. Birnholz, to clarify one area of your testimony, do I understand you correctly to say that the market from '69 was a highly competitive market?

* * *

A. *It was reasonably competitive.*

* * *

Q. *You are not aware of anybody who had a particular economic power advantage?*

A. *I don't think so. The market really dictates the competition, just things that are required to customers.*

(T. 113, 114).

5. The "Tied Product" Market

Even assuming the existence of a legally cognizable tied market, the testimony of Petitioners' only experts, Birnholz and Parra, affirmatively negates any finding that Petitioners' lease payments had any anti-competitive effects on any tied product market.

As Birnholz testified at trial:

Q. Mr. Birnholz, given those basic factors that you have the lease facility and the recreational facilities, where they are and there is no question that the most practical use of those facilities are for the people who live there and not outsiders—

A. Right, sir.

Q. —and *as a practical matter that swimming pool area and that pool area is not competing with any swimming pool anywhere else*—

A. It doesn't appear to be, but—

Q. Well, *as a practical matter, it isn't going to be competing with anybody who has got a swimming pool, with somebody in Hallandale or Fort Lauderdale.*

A. *No.*

Q. If it competed in any way, it would have to be competing with the Condominium Association, to-wit, the lessor.

A. It appears that way from the lease.

Q. And there would be no way because they wouldn't share in the revenue. So, there is a *separate market* for that pool and that shuffleboard?

A. That's why I considered those improvements to be a detriment and I considered it *excess.*

Q. And it *doesn't make a difference if it is exclusive or non-exclusive?*

A. Non-exclusive would be greater flexibility for other parties, but *basically, no.*

Q. So to sum up, as a practical matter, it is not something *competing in any other market anywhere?*

A. *No, I consider it excess.*

(T. 100, 101). Indeed, Birnholz was most insistent that the leased area was superfluous and unnecessary to the Plaintiffs:

Q. Would your appraisal be the same if some of it was under the ninety-nine year lease?

A. No, sir.

Q. Why not? What is the difference?

A. *In this situation, I consider the area leased to be almost superfluous to the entire project.*

If one reviewed the photograph, it does not show the recreational facilities available to the property owner at Commodore Plaza. It showed only a portion because it was at a different level. The pool was adjacent to a rather large pool deck other people could use.

This pool area required going through a parking garage or down stairwells to that pool deck. It was not in the central area that one would associate with an amenities package.

(T. 109, 110). And again, on re-direct by Petitioners' counsel:

. . . the common elements that the unit owners own is everything.

If there is a small portion that they don't own which is located where the exhibit is located, *I would have to consider that to be superfluous and excess to the entire project.*

(T. 115). And finally,

Q. *And there is really no market for . . . [the formerly leased premises] the way it presently exists?*

A. *That is precisely why I stated earlier that my conclusion is that it should be treated only for land value.*

(T. 127).

On the issue of competition in the tied product market, Parra—the Petitioners' only economist—had this to say:

Q. But to make sure I am clear on that point with regard to a fee simple piece of property and a leased piece of property, where the two are together—forget about condominiums, but that kind of situation, if you submitted that for review while you are with your mortgage company, you view that as a *package* deal, right, sir?

A. *Right.*

Q. *And there was nothing anticompetitive by virtue of the fact that that is the way it was submitted?*

A. *No.*

Q. Or by virtue of the fact that instead of paying all of the money for the piece of property in fee simple, and a part of it was paid for the property in fee simple and a portion of the moneys were paid over a ninety-nine year lease. *There is nothing anti-competitive about that, is there, sir?*

A. *No.*

Q. *Nothing that would adversely effect any market that you know of anywhere, right, sir?*

A. *Right.*

(T. 596-597). And finally,

Q. Okay. Now, can you identify *any entity in this leisure time industry,* as you referred to it, *that has been affected by virtue* of the existence *of the lease* at Century 21?

A. *No.*

Id. (T. 600).

Petitioners failed to prove any of the elements of an illegal tying arrangement in the trial court. This is not surprising.

Petitioners would have had to demonstrate how one arbitrarily designated .46 acre plot of land which had been rendered subject to a 99 year lease was a viable product. The .46 acre plot is surrounded by recreation areas which include tennis courts, shuffleboard, a large pool, sun bathing areas and boat docks. The formerly leased premises which were sold to the Condominium Association in 1979 contain a much smaller pool, a green carpet used as a putting green and a portion of a small covered area consisting of a roof and four posts, two of which rest within the formerly leased premises and two of which are located on common elements. They were so insignificant in terms of their utility for recreational facilities that Petitioners' expert appraiser, Mr. Birnholz, characterized them as "superfluous" and "excess".

Even if Petitioners had proven the existence of a viable second (tied) product in this case they would have had to demonstrate sufficient economic power on the part of the developers in the market for condominiums where

the developers were struggling for their economic existence, attempting to survive in an industry which Petitioners' experts conceded was highly competitive. In fact, it was the Petitioners who enjoyed a superior economic position, power or advantage over the developers at that time as exemplified by the testimony of one of the Petitioners who negotiated a significant decrease in the developers' purchase price by bargaining and causing the developers to beat a competitor's price. The developers enjoyed such an economic "advantage" that it took them 7 years to sell their units and they lost more than $4,200,000 on the sale.

Nor were the Petitioners able to prove even the existence of any tied product market, much less the existence of any anti-competitive effects in such a market. Plaintiffs presented no competent evidence, let alone any market study, to establish *the existence of any market for any tied product in which competition was even allegedly affected by the "superfluous" segment of the recreational facilities formerly subject to the lease in this case.* In fact, Petitioners' expert admitted that he knew of not one (1) single competitor in any market for the subject premises.

SUMMARY OF ARGUMENT

The trial court's order and entry of judgment stated in pertinent part:

> 2. Plaintiffs failed to prove the existence of sufficient economic power in the tying marking [sic] to coerce purchase of the tied market. The alleged tie-in arrangement neither foreclosed the typing [sic] party's competitors from a segment of the tied product market nor did it deprive the alleged tie's victims of the ad-

vantages of shopping around. Thus the arrangement exhibits neither of the two principal evils of tie-in arrangements. *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368 (5th Cir. 1977).

The great weight of the evidence was clearly to the effect that the markets for condominium units in the North Dade area or the Dade, Broward, and Palm Beach County areas were highly competitive and that the requisite economic power or dominance was not possessed by defendant in any relevant market. See, e.g., *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977); and *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419 (5th Cir. 1978).

3. Plaintiffs failed to demonstrate any anti-competitive [effects] on any market. Plaintiffs' experts conceded at trial that the portion of the facilities subject to the lease at Commodore was not in competition with any other such facilities and that no competitor was foreclosed in the relevant market area by the imposition of the lease in this case. *Under the circumstances, there was virtually no effect, anti-competitive or otherwise, on any market.* There was no evidence of any buyers forced to forego free choice between competing products. See, e.g., *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958).

(App. 1).

The Eleventh Circuit Court of Appeals in affirming the District Court found in pertinent part:

In issuing his order, the district judge held that Moskowitz and Koltun failed to: (1) prove the existence of two legally cognizable separate and distinct

products; (2) prove that defendants possessed economic power in the tying product market; (3) prove anticompetitive effects; and (4) prove an effect on interstate commerce. In order to establish the existence of an illegal tying arrangement, each element (and others) must be shown by the plaintiff. *See Driskill v. Dallas Cowboys Football Club, Inc.*, 498 F.2d 321 (5th Cir. 1974). *In this case, as in Driskill, the plaintiffs failed to make any showing of coercion or anticompetitive effects, see id. at 323, and the factfinder cannot infer coercion or effect from the existence of a tie-in, as plaintiffs apparently contend, United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610, 617-18 (1977) (Fortner II).

• • •

(App. 2).

First, Petitioners failed completely to demonstrate even the existence of any tied product market or the very existence of any competitor in any market for the tied product. In fact, as Petitioners' experts conceded at trial, and as the trial court found, the portion of the recreational facilities rendered subject to the lease was not in competition with any other such facilities and no competitor was foreclosed by the imposition of the lease in this case.

Petitioners' argument on this point proceeds from a misconception concerning the evidence at trial and from a misapplication of certain decisions by this Court which deal with the jurisdictional requisite of a "price fixing" claim rather than the substantive issue of a "tying" claim addressed by the Appellate Court.

Second, Petitioners failed completely to demonstrate that Respondents possessed sufficient economic power in

the tying market to coerce purchase of the tied product. In fact, the clear testimony of Petitioners' experts was that Petitioners purchased a package consisting of their condominium units and recreational facilities, an insignificant portion of which required a monthly payment to the developer under a lease; that the market for condominium units was highly competitive; and that Respondents enjoyed no advantage, much less any "power" in that market whatsoever.

Petitioners' argument on this point proceeds from a misreading of the Eleventh Circuit's affirmance of the trial court. Petitioners incorrectly read that opinion as having found that Petitioners failed simply to show coercion in general whereas the Appellate Court had found that Petitioners had failed to show "coercion" that is a result of the requisite economic power as discussed on page 323 of the Fifth Circuit's opinion in *Driskill v. Dallas Cowboys Football Club, Inc.*, 498 F.2d 321 (5th Cir. 1974). Coercion cannot be inferred from the mere existence of a tie-in. There must be the economic power as required by *United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610, 617-618 (1977) (*Fortner* II)—all of which was affirmatively negated by the evidence. Even if one could infer coercion from the existence of a tie-in under some set of circumstances, to do so in this case would ignore the realities of this transaction which involved the purchase of a package consisting of a condominium unit and recreational facilities, a small segment of which was rendered subject to a lease which required monthly payments, which lease was complete in the first instance and did not involve the commitment to purchase necessary supplies in the future only from a particular seller.

ARGUMENT

I. THE APPELLATE COURT DID NOT ERR IN FINDING THAT PETITIONERS FAILED IN THEIR PROOF OF A TYING ARRANGEMENT CLAIM WHERE PETITIONERS FAILED TO DEMONSTRATE THE MERE EXISTENCE OF A TIED PRODUCT MARKET OR OF ANY ANTI-COMPETITIVE EFFECTS ON ANY MARKET AS A RESULT OF THE PURCHASE OF A CONDOMINIUM UNIT WITH RECREATIONAL FACILITIES WHERE AN INSIGNIFICANT PORTION OF THOSE FACILITIES REQUIRED PAYMENTS PURSUANT TO A LEASE.

Petitioners state the second issue before this Court as follows:

> Did the Eleventh Circuit Court of Appeals and the Trial Court err in finding that Plaintiffs did not demonstrate a sufficient showing of anticompetitive effects in the trial below by disregarding prior decisions of this Court and substituting a different standard than the one set by this Court.

Petitioners do not cite any Circuit Court cases which conflict with any decisions of this Court on the subject. Those Supreme Court cases which Petitioners rely on in support of this issue are not in conflict with the law as applied to this case by either the trial judge or the Eleventh Circuit Court of Appeals.

Petitioners' reliance on *McClain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980), *United States v. United States Gypsum Company*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978) and *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), for the proposition that an antitrust

plaintiff in a tying arrangement case need not show proof of an anticompetitive effect is misplaced.

First, *McClain, supra, United States Gypsum, supra* and *Goldfarb, supra,* did not involve tying arrangement claims, but instead involved claims of alleged price fixing. Secondly, all three cases to the extent that they did involve Sherman Act claims dealt with the jurisdictional element of price fixing claims and not the substantive element of a tying arrangement claim. As this Court stated in *McClain, supra*:

> *To establish the jurisdictional element of a Sherman Act violation* it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful. The validity of this approach is confirmed by an examination of the case law. *If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect.* This is not the rule of our cases. *See American Tobacco Co. v. United States,* 328 U.S. 781, 811, 66 S.Ct. 1125, 1139, 90 L.Ed. 1575 (1946); *United States v. Secony-Vacuum Oil Co.,* 310 U.S. 150, 225, n. 59, 60 S.Ct. 811, 846, 84 L.Ed. 1129 (1940). A violation may still be found in such circumstances because in a civil action under the Sherman Act, liability may be established by proof of either an unlawful purpose or an anticompetitive effect. [citation omitted].

444 U.S. 242-243.

By citing to page 323 of the Fifth Circuit's opinion in *Driskill v. Dallas Cowboys Football Club, Inc.*, 498 F.2d 321 (5th Cir. 1974), and specifically the discussion contained on page 323 of *Driskill, supra*, the Appellate Court clearly indicated that it had reference to the substantive element of an alleged tying arrangement when it noted that Petitioners' proof was deficient. That element is identified at page 323 of the *Driskill* opinion as follows:

> [3] *anticompetitive effects* in the *tied market*

498 F.2d 323 (citing *Coniglio v. Highwood Services, Inc.*, 495 F.2d at 1289 (2d Cir. 1974).

Petitioners' assertion that somehow *McClain v. Real Estate Board of New Orleans, Inc., supra, United States v. United States Gypsum Company, supra* or *Goldfarb v. Virginia State Bar, supra* conflicts with the Eleventh Circuit's opinion is premised upon a misapprehension that any of those cases relate to the Eleventh Circuit's finding that Petitioners failed to make any showing of anticompetitive effects as that showing is discussed at page 323 of the Fifth Circuit's opinion in *Driskill v. Dallas Cowboys Football Club, Inc., supra.* Accordingly, the Eleventh Circuit's opinion not only does not conflict with any case cited by Petitioners on the issue of anticompetitive effects, but does not relate to the jurisdictional premise of an alleged Sherman Act "price fixing" violation. The opinion instead relates to the question of anticompetitive effects in the tied market with respect to which the Eleventh Circuit found Petitioners' proof had been deficient.

Indeed, Petitioners' case was fatally deficient on this point. Petitioners read the testimony of their economic expert Mr. Parra at trial. Mr. Parra had testified at an evidentiary hearing in this matter which had been conducted in 1979. When asked on what basis he was prepared to testify he stated:

Q. Do you know why you are here exactly?

* * *

A. Well, I am here to render an expert testimony as to the impact on interstate commerce of the *recreational lease* which is a subject matter of the entire proceeding.

(T. 561).

Accordingly, Parra's testimony, to the extent that it was admissible at all, was limited to the effect the subject lease had on interstate commerce.

Secondly, quite apart from a "recreational activities" market or any hybrid thereof, Parra testified that the subject leasehold belonged to the "leisure time" market. When asked what comprised that market, he defined it as follows:

A. Well it involves activities in the field of sports, entertainment, events, and private clubs that are constantly being organized for the benefit of members to engage themselves in the leisure time activities. And there is an entire industry that has developed around this concept of leisure time, in South Florida in particular because of its competence as a resort area within the state and within the county.

It tends to have a higher incidence of recreational activities than other areas in the state, and it is commonly known that tourism, recreation and leisure time activities form one of the main stays of the county's economic base.

(T. 563).

As Parra had to concede on the issue of anticompetitive effects on any market whatsoever:

Q. Then in that sense people at Commodore Plaza, because the already have the large pool, are not really a very good prospect for anybody else in the South Florida area who has a swimming pool and who wants to offer swimming pool services, are they?

A. *No, sir.*

(T. 584).

Mr. Parra went on to admit:

Q. Okay. From the standpoint of any kind of competition, though, so we know where we stand on that, there really is no ongoing competition, so to speak, between a ninety-nine year lease at Aventura and a ninety-nine year lease at Century 21, is that right?

A. I think that the ninety-nine year lease at Century 21 could not compete against any other leases.

(T. 588).

Indeed, Mr. Parra candidly admitted that a study would have to be done to determine whether the buyers at Commodore Plaza would be prone to joining other clubs or availing themselves of other types of recreational goods or facilities (T. 593, 598). No such study was ever offered at trial.

As Mr. Parra concluded:

Q. Okay. Now, can you identify any entity in this leisure time industry, as you referred to it, that has been affected by virtue of the existence of the lease at Century 21?

A. *No.*

(T. 600).

Petitioners presented no competent proof to establish even *the existence of any market* for the segment of the recreational facilities rendered subject to the lease in this case. Moreover, Petitioners presented no competent evidence, let alone any market study, to establish the existence of any anticompetitive effects whatsoever on any such market. In fact, Petitioners' expert conceded that there was no market with respect to which the segment of the recreational facilities rendered subject to the lease competed (T. 100, 101). Accordingly, the Eleventh Circuit's opinion affirming the trial court's entry of judgment n.o.v. on the issue of anticompetitive effect is clearly correct.

II. THE APPELLATE COURT DID NOT ERR IN FINDING THAT A SHOWING OF COERCION AS IT RELATES TO SUFFICIENCY OF ECONOMIC POWER IN A TYING ARRANGEMENT CASE IS NOT DEMONSTRATED MERELY BY THE REQUIREMENT THAT A PURCHASER OF A UNIT IN A CONDOMINIUM COMPLEX WITH EXTENSIVE RECREATIONAL FACILITIES ALSO MAKE MONTHLY PAYMENTS PURSUANT TO A LEASE ON AN INSIGNIFICANT PORTION OF THOSE FACILITIES.

Even assuming that Petitioners had carried their burden and demonstrated the very existence, let alone the extent, of any market anywhere on which any anticompetitive effect was exerted or felt, they failed to make any showing of sufficient economic power in the tying market to coerce purchase of the tied product.

The trial court found that Petitioners had failed to demonstrate anything other than that the market for condominium units was highly competitive and that ". . . the

requisite economic power or dominance was not possessed by [Respondents] in any relevant market." (App. 1).

By referring directly to page 323 of the Fifth Circuit's opinion in *Driskill v. Dallas Cowboys Football Club, Inc.*, 498 F.2d 321 (5th Cir. 1974), the Appellate Court below indicated that its reference to "coercion" (App. 2) was in the context of the "second" of the characteristics of an illegal tying arrangement:

> (2) sufficient economic power in the tying market to coerce purchase of the tied product.

Id. at 323.

As the Fifth Circuit went on to note at page 323 of its opinion in *Driskill, supra*:

> This suit presents a claim not present in any of the other litigation, however. Driskill alleged the tying of undesirable low-interest stadium bonds to the desirable season ticket package, while all the other suits presented only the issue of tying preseason game tickets to those for the regular season games. This claim quite clearly involves two different products—long-term bonds and football tickets—and the Cowboys concededly have a complete monopoly over the latter, which is the tying product. However, . . . *Driskill failed to forestall summary judgment on this part of his claim by failing to assert specific facts tending to show either exploitation of their monopoly by the Cowboys to coerce the purchase of the bonds or any anticompetitive effect in the tied market for long-term bonds. Since Driskill failed to come forth with* a showing of any specific facts supporting his position with regard to *either coercion or anticompetitive effects*, the summary judgment against him was proper.
>
> Affirmed.

By directly incorporating the foregoing by reference in its opinion affirming the judgment of the trial court, the Eleventh Circuit established that its finding that Petitioners' failure to make any showing of coercion in accordance with *Driskill, supra* meant that *Petitioners had failed to show that Respondents had exploited their "monopoly" in order to coerce the purchase of the alleged tied product in this case.*

At trial, no unit owners or buyers testified for Petitioners on the issue of economic power or the market area, not even Petitioners themselves. All witnesses agreed that the market for condominiums in south Florida at the time of Petitioners' respective purchases in 1969 and 1972 was highly competitive. Indeed, the unrefuted evidence from Petitioners' expert, Birnholz, was that no one had any market power in the condominium market. The unrefuted evidence was that the market was abundantly stocked with numerous condominiums which sharply competed in price and in facilities with those at Commodore Plaza but which, in effect, dictated what the developers had to do to meet competition.

Indeed, including the two year selling period featuring special discounts, the sell-out period at Commodore Plaza lasted for 7 years, from 1969 until 1976. The unrefuted testimony with respect to that period was that in order to consummate a sale in one instance the developer agreed in effect to pay one purchaser's share of the subject lease for five years from the date of his purchase.

Competition was so great that Petitioner MOSKOWITZ testified that he was able to secure a $6,500 dollar discount on his purchase by using the prices of other available condominiums as leverage:

> Q. And that was a brochure that showed a condominium unit at Plaza Towers South at $35,000,

and you used that to try to negotiate Mr. Cohen down on the price of his unit, correct?

A. Can I answer that in a way that it really happened?

Q. Answer it yes or no and then explain.

A. I never showed Mr. Cohen anything. As far as the brochure is concerned, it was on the table. What happened when I came to Century 21, *Mr. Cohen asked for $43,000.* I said it was out of the question.

I was going out, and he came after me at the elevator and said, "All right. You can have it for $41,000."

I said *"It was too high. I have to go back to Plaza Towers South."*

He says, *"Please come back to me before you decide to buy an apartment.* Let me know what it will cost you."

I came back about *a half hour later,* and I told him—I says the price was too much, forty-one thousand. *He came down to thirty-nine.* Finally, I says *"Look I can buy an apartment for thirty-five thousand."*

He told me that was out of the question. It was ridiculous, so he says, *"I will tell you what. We will split it. Pay me thirty-six five," and that is what I paid. That is what really happened.*

(T. 761, 762).

Are these the indicia of market power? Were the developers in this case able to dictate the terms of their

sales in the condominium market? Were they able to exert sufficient economic power in *any* market to warrant a violation of the Sherman Anti-Trust Act? To ask the questions is to answer them. No reasonable man could find the requisite economic power.

Petitioners, however, for purposes of their petition for certiorari at least appear to take the position that coercion was not regarded by the Eleventh Circuit as related at all to sufficiency of economic power. This notion is incorrect.

Indeed, if Petitioners were correct in their assumption that coercion could be proven by a contractual commitment alone, there would be no reason to inquire further as to the economic power of a seller where such a commitment exists since the measure of that power is defined in terms of being sufficient to coerce purchase of a second product, and coercion, according to Petitioners, would have been proven. This narrow view of antitrust law would produce absurd results. In the case of a local furniture retailer who refused to sell one chair alone but would only sell them two at a time, for example, the fact that there was a requirement that a second chair be purchased if a first chair was purchased would constitute "coercion". To the extent that contractual commitment would establish economic power, the local furniture seller would be held to possess sufficient economic power in the market to "coerce" the purchase of a second product. By its direct reference to coercion, the Court was considering coercion as that term is discussed at page 323 of *Driskill, supra*, i.e., ". . . sufficiency of economic power to coerce purchase of the tied product." *Id.* at 323, and not as the Fifth Circuit discussed the term in *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307 (5th Cir. 1976).

Petitioners' reliance on *Northern Pacific Railway v. United States,* 356 U.S. 1, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958) is misplaced. The *Northern Pacific, supra,* case assumes the very fact in issue, i.e. that a party possesses sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product. *Id.* at 6. As this Court noted in *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 614, 73 S.Ct. 872, 883, 97 L.Ed. 1277 (1953):

> The common core of the adjudicated unlawful tying arrangements is the *forced* purchase of a second distinct commodity with the desired purchase of a *dominant "tying" product,* resulting in economic harm to competition in the "tied" market.

Contrary to the representation contained on p. 12 of Petitioners' brief, this Court in *Northern Pacific, supra* never discussed, much less indicated, that coercion may be found in the agreement itself.

Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307 (5th Cir. 1976) involved an appeal from a directed verdict and a judgment entered on behalf of a franchisor of computer centers against four former franchisees. The franchisees had alleged that the franchisor had imposed territorial restrictions on their sale of computer time-sharing services and that the franchisor had tied the sale of the franchise to the lease of computer hardware from the franchisor. In affirming the trial court's entry of a directed verdict on both antitrust counts, the Fifth Circuit observed:

> As recognized by the Supreme Court, implicit in this formulation is the requirement that this requisite

economic power actually be utilized to coerce the purchase of the tied product:

> The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant "tying" product, resulting in economic harm to competition in the "tied" market. [emphasis added].

Times-Picayune Publishing Co. v. United States, 1953, 345 U.S. 594, 614, 73 S.Ct. 872, 883, 97 L.Ed. 1277. See also *Southern Concrete Co. v. United States Steel Corp.*, 5 Cir. 1976, 535 F.2d 313.

We thus agree with the Third Circuit that, *in order to establish an illegal tie, it is not enough to show, that the seller has sufficient economic power* and that two products were purchased together. *In addition, it must be shown that the purchaser was coerced into purchasing an unwanted product:*

Id. at 1327.

The Court went on to note:

> Of course, in certain circumstances, the element of coercion can be established on the basis of a formal agreement. Thus, where one product is sold on the express contractual condition that the purchaser purchase supplies for that product in the future only from the seller, the purchaser's future course of action is limited by that contract, and coercion is found in the agreement itself. *See, e.g., Advance Business Systems & Supply Co. v. SCM Corp.*, 4 Cir. 1969, 415 F.2d 55. But no such situation is before us. *Here, the contractual arrangement left the franchisees free to procure the necessary hardware from any available*

> *source*. Thus, in order to succeed on their claims, the franchisees must establish that their decision to lease the hardware from Leasco was not voluntary, but rather was coerced by Leasco.

537 F.2d 1328.

Accordingly, while the Eleventh Circuit, by virtue of its direct reference to page 323 of the Fifth Circuit's opinion in *Driskill, supra,* used the term "coercion" to mean that Petitioners had failed to demonstrate that Respondents had exploited ". . . their monopoly [economic power is the tying market] . . . to *coerce* the purchase of the [tied market]", *Id.* at 323, the Fifth Circuit in *Response of Carolina, supra,* was referring to coercion as an additional characteristic of a tying arrangement. The separate element of "coercion" as discussed in *Response of Carolina, supra,* was therefore, not addressed by the Eleventh Circuit's opinion affirming the trial court in this case since by the finding of a lack of the requisite economic power it was unnecessary to go any further. As the Eleventh Circuit observed, ". . . the factfinder cannot infer coercion or effect from the existence of a tie-in, as plaintiffs apparently contend," *United States Steel Corp. v. Fortner Enterprises,* 429 U.S. 610, 617-618 (1977) (*Fortner* II) (App. 2).

Even if the Eleventh Circuit's reference to page 323 of the *Driskill* opinion was of no significance, Petitioners' conclusion that a finding of coercion is mandated by the facts of this case is not warranted. The application of the Court's dicta in *Response, supra,* begs many questions in this case. Petitioners purchased their condominium units in fee simple together with a share of the recreational facilities that was so substantial that Petitioners' expert conceded that the randomly selected additional

portion of land which had been rendered subject to the recreation lease was "superfluous" and was not in competition with any product anywhere in any market. Petitioners purchased a "package" which was comprised of their condominium units in fee simple and recreation facilities the majority of which was purchased in fee simple and a small portion of which was rendered subject to a 99 year lease. There were no further "supplies" required or furnished.

In addition, there certainly was never any requirement that Petitioners purchase any "supplies" *only* from the Respondent or its predecessors in the future. Petitioners remained free to purchase any "recreational business" or facilities they wished to purchase. To do so in this case would have been ridiculous, not because Petitioners were "coerced" into purchasing their condominium units which included their share of the larger recreational facilities and the insignificant portion of those facilities rendered subject to the lease, but because the "package" they purchased was complete from the start and required no further augmentation. Inasmuch as the purchase of a "leisure living package" was complete at the outset, *Chatham Condominium Association v. Century Village, Inc.*, 597 F.2d 1002 (5th Cir. 1979), it was merely the form of the transaction and not its substance that required future payments to be made under the lease.

CONCLUSION

The Writ of Certiorari sought by Petitioners should be denied for the reasons heretofore stated.

Respectfully submitted,

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APPENDIX

APPENDIX 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 74-570-Civ-JWK

FRED MOSKOWITZ and CLARENCE KOLTUN,
Plaintiffs,

vs.

SAUL J. MORGAN ENTERPRISES, INC., et al.,
Defendants.

ORDER GRANTING JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE GRANTING NEW TRIAL

This cause came on to be heard on defendants' motion for judgment notwithstanding the verdict and to order judgment for defendants in accordance with defendants' previous motion for directed verdict or, in the alternative, for a new trial. The court having carefully reviewed the file and the extensive memoranda filed by the parties, and being otherwise duly advised in the premises, it is

ORDERED AND ADJUDGED that the verdict for plaintiffs be and the same is hereby set aside and that judgment be and the same is hereby entered in favor of defendants on the grounds that the verdict is contrary to the great weight of the evidence and that the facts and inferences point so strongly in favor of defendants

that the court believes that reasonable persons could not arrive at a verdict for plaintiffs. See, e.g., *Conway v. Chemical Seaman Tank Lines*, 610 F.2d 360 (5th Cir. 1980); *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969). Specifically, the court finds:

1. Plaintiffs failed to elicit the requisite proof on the existence of two distinct products and any finding of two distinct products implicit in the general verdict is contrary to the great weight of the evidence.

Plaintiffs contended that certain portions of the lower and smaller of two pool decks at Commodore Plaza Condominium (Commodore) which was subject to a 99 year lease constituted a separate and distinct product from the purchase of a condominium unit together with a pro-rata share of the common elements at Commodore which common elements included a much larger pool, pool deck, and other facilities.

Plaintiffs at trial suggested that the leased portion of the facilities was merely excess and surplusage in light of the other substantial facilities that were part of the common elements. Plaintiffs' experts testified that there is no competing market for the leased area. The great weight of the evidence demonstrated that as to the leased area any meaningful connection to recreation was little more than pleasantly coincidental to defendants and was irrelevant to plaintiffs. *Levinson v. Maison Grande, Inc.*, 517 F.Supp. 963 (S.D. Fla. 1981) (appeal pending). Those items which were made subject to the lease, i.e., the smaller of two swimming pools, a divided covered area, one portion of which is on land subject to the lease while the remainder is on land owned in fee by the unit owners, and a small putting green, do not constitute a product separate and distinct from the condominium units themselves or from a condominium leisure living package.

Further, the items subject to the lease do not render the leased area a "club." *Chatham Condominium Association v. Century Village, Inc.*, 597 F.2d 1002 (5th Cir. 1979).

2. Plaintiffs failed to prove the existence of sufficient economic power in the tying marking to coerce purchase of the tied product. The alleged tie-in arrangement neither foreclosed the typing party's competitors from a segment of the tied product market nor did it deprive the alleged tie's victims of the advantages of shopping around. Thus the arrangement exhibits neither of the two principal evils of tie-in arrangements. *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368 (5th Cir. 1977).

The great weight of the evidence was clearly to the effect that the markets for condominium units in the North Dade area or the Dade, Broward, and Palm Beach County areas were highly competitive and that the requisite economic power or dominance was not possessed by defendant in any relevant market. See, e.g., *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977); and *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419 (5th Cir. 1978).

3. Plaintiffs failed to demonstrate any anti-competitive on any market. Plaintiffs' experts conceded at trial that the portion of the facilities subject to the lease at Commodore was not in competition with any other such facilities and that no competitor was foreclosed in the relevant market area by the imposition of the lease in this case. Under the circumstances there was virtually no effect, anti-competitive or otherwise, on any market. There was no evidence of any buyers forced to forego free choice between competing products. See, e.g., *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958).

4. The great weight of the evidence is to the effect that plaintiffs were unable to establish a "not insubstantial" amount of interstate commerce in the tied market insofar as they failed to prove the existence of a tied market which might be so effected, i.e., the great weight of the evidence was that there was no tied market.

With regard to defendants' motion for new trial, the court finds that the verdict is against the clear weight of the evidence with regard to all of the issues discussed above. See, e.g., *Weyerhauser Co. v. Bucon Construction Co.*, 430 F.2d 869 (5th Cir. 1967). Additionally, the court finds that the jury's award of damages was without basis in law or fact. The lack of competent evidence to support the damages awarded by the jury is sufficient cause to order a new trial. See, e.g., *Richardson v. Communication Workers of America, AFL-CIO*, 530 F.2d 126 (5th Cir. 1976).

Accordingly, it is further

ORDERED AND ADJUDGED that defendants' motion for new trial be and the same is hereby granted, this ruling granting defendants' motion for new trial to take effect *only* in the event that the ruling of the court on defendants' motion for judgment notwithstanding the verdict is reversed on appeal.

It is further

ORDERED AND ADJUDGED that this court retain jurisdiction to award costs to defendants in an amount to be determined by the court upon proper motion.

DONE AND ORDERED in chambers at Miami, Florida, this 25th day of June, 1982.

/s/ James W. Kehoe
James W. Kehoe
United States District Judge

CC: All Counsel

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 82-5832

COMMODORE PLAZA AT CENTURY 21
CONDOMINIUM ASSOCIATION, INC., et al.,
Plaintiffs,

FRED MOSKOWITZ, CLARENCE KOLTUN,
Plaintiffs-Appellants,

versus

SAUL J. MORGAN ENTERPRISES, INC.,
et al., etc.,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Florida

(January 27, 1984)

Before HILL and HATCHETT, Circuit Judges, and ALLGOOD*, District Judge.

PER CURIAM:

Plaintiffs Fred Moskowitz and Clarence Koltun appeal from the order of the district court granting judgment n.o.v. to the defendants in this case. Moskowitz and Koltun also challenge the order of the district court refusing to certify their lawsuit as a class action. We hold that the district court properly resolved both issues and affirm.

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*Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

This case presents a factual situation similar to one the predecessor to this court encountered in *Chatham Condominium Associations v. Century Village, Inc.*, 597 F.2d 1002 (5th Cir. 1979). In both cases, the plaintiffs alleged that condominium vendors violated the antitrust prohibition against tying arrangements by requiring purchasers of condominiums to lease an individual interest in common areas in connection with their purchase. This case differs from *Chatham,* however. In *Chatham* we reviewed an order dismissing the case for lack of jurisdiction; here we review an order granting judgment n.o.v.

In issuing his order, the district judge held that Moskowitz and Koltun failed to: (1) prove the existence of two legally cognizable separate and distinct products; (2) prove that defendants possessed economic power in the tying product market; (3) prove anticompetitive effects; and (4) prove an effect on interstate commerce. In order to establish the existence of an illegal tying arrangement, each element (and others) must be shown by the plaintiff. *See Driskill v. Dallas Cowboys Football Club, Inc.*, 498 F.2d 321 (5th Cir. 1974). In this case, as in *Driskill,* the plaintiffs failed to make any showing of coercion or anticompetitive effects, *see id.* at 323 and the factfinder cannot infer coercion or effect from the existence of a tie-in, as plaintiffs apparently contend, *United States Steel Corp. v. Fortner Enterprises,* 429 U.S. 610, 617-18 (1977) (*Fortner* II). It is thus clear that the district judge properly entered judgment n.o.v. and we therefore need not address Moskowitz' and Koltun's contentions that the judge erred in entering judgment on the other grounds set forth.

We also find no error in the judge's order denying class certification. The judgment is

AFFIRMED.

APPENDIX 3

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5832

D.C. Docket No. 74-00570

COMMODORE PLAZA AT CENTURY 21 CONDOMINIUM ASSOCIATION, INC., et al,
Plaintiffs,

FRED MOSKOWITZ, CLARENCE KOLTUN,
Plaintiffs-Appellants,

versus

SAUL J. MORGAN ENTERPRISES, INC., etc., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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Before HILL and HATCHETT, Circuit Judges, and ALLGOOD*, District Judge.

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*Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: January 27, 1984
For the Court: Spencer D. Mercer,
Clerk

ISSUED AS MANDATE:

By: /s/ [illegible]
Deputy Clerk

APPENDIX 4

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5832

COMMODORE PLAZA AT CENTURY 21
CONDOMINIUM ASSOCIATION, INC., ET AL,
Plaintiffs,

FRED MOSKOWITZ, CLARENCE KOLTUN,
Plaintiffs-Appellants,

versus

SAUL J. MORGAN ENTERPRISES, INC.,
ET AL., ETC.,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Florida

**ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BANC**

(Opinion January 27, 11 Cir., 1984, ... F.2d .....)

(Filed March 8 1984)

Before HILL, HATCHETT, Circuit Judges, and ALL-GOOD*, District Judge.

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*HON. Clarence Allgood, U.S. District Judge, for the Northern District of Alabama, sitting by designation.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

James C. Hill
United States Circuit Judge

APPENDIX 5

(Birnholz - direct)

[75] * * * to take this gentleman's deposition right now and if you need any additional time, I will entertain a motion in that regard.

At this point, I will allow you to take his deposition. Please notify me when you complete his deposition.

[Recess taken.]

THE COURT: Bring the jury in. [Jury entered the courtroom and the following proceedings were held in open court:]

THE COURT: Approach the Bench. [Sidebar conference between the Court and counsel off the record.]

BY MR. PAGLINO:

Q Mr. Birnholz, we had asked you if you had come to an opinion as to the value of the real estate we have been describing as the recreation area adjacent to the Commodore Plaza, that .46 of an acre.

A Yes, sir.

Q What is your opinion?

A It is my judgment as of the period of time of 1978, the value of the .46 acre was approximately $60,000.

* * *

(Birnholz - direct)

[78] * * * be charged for that property?

A On an economic basis, Mr. Paglino, if it were pure land, the value would be $6,000 to $7,000 per annum on a net basis.

Q Have you seen this property?

A Yes, sir.

Q And you have seen what is on it?

A Yes.

Q What is on it?

A On this particular .46 acre, there is a relatively small pool, a gazebo, open-air type of facility, some green carpeting used as a putting green and concrete paving and a beach area to the best of my recollection.

MR. PAGLINO: No further questions.

THE COURT: Mr. Richman, you may cross examine.

CROSS EXAMINATION

BY MR. RICHMAN:

Q Did you notice whether there were any shuffleboards on the property?

A Not on the leased area.

Q You are certain there are none?

A No, I am not certain. I have been * * *

* * *

(Birnholz - cross)

[95] * * * useless?

MR. PAGLINO: Object as to his opinion.

THE COURT: Sustained.

BY MR. RICHMAN:

Q So if it was widely used, it might have some value?

A Yes.

Q As a matter of fact, Mr. Birnholz, at Commodore Plaza, that facility I am referring to the leased area, if it has value, it has value to only the people that live there and not the general public?

A I didn't think there was access to there from another area. I believe I was just shown on this diagram that there is access to that area.

Q I am going to ask you to assume hypothetically for purposes of my question that there is, as a practical matter, no way to get to these premises other than the common elements of the Commodore Plaza or by boat from the water.

A That's correct. I think it is correct except for that walkway.

Q As a practical matter, it is really of use and benefit for the people who live there.

A Yes.

* * *

(Birnholz - cross)

[100] * * * it should be in evidence.

THE COURT: So offer it.

MR. RICHMAN: Let me just make sure it is the full document.

Your Honor, it is rather lengthy. Subject to our looking at it during a break, we will agree to have it admitted.

THE COURT: Plaintiffs' No. 2 in evidence.

[Plaintiffs' Exhibit No. 2 was received in evidence.]

BY MR. RICHMAN:

Q Mr. Birnholz, given those basic factors that you have the lease facility and recreation facilities, where they are and there is no question that the most practical use of those facilities are for the people who live there and not outsiders—

A Right, sir.

Q —and as a practical matter that swimming pool area and that pool area is competing with any swimming anywhere else—

A It doesn't appear to be, but—

Q Well, as a practical matter, it isn't going to be competing with anybody who has got a swimming pool with somebody in Hallandale or Fort Lauderdale.

[101] A No.

Q If it competed, in any way, it would have to be competing to the Condominium Association, to-wit, the lessor.

A It appears that way from the lease.

Q And there would be no way because they wouldn't share in the revenue. So, there is a separate market for that pool and that shuffleboard?

A That's why I considered those improvements to be a detriment and I considered it excess.

Q And it doesn't make a difference if it is exclusive or non-exclusive?

A Non-exclusive would be greater flexibility for other parties, but basically, no.

Q So, to sum up, as a practical matter, it is not something competing in any other market anywhere?

A No, I consider it excess.

Q Did you indicate earlier that one of the reasons that the water access wasn't of importance to you was because a retiree would not be interested in having a boat there in the market that existed then?

A It wasn't typical of a boat buyer in that type of facility coupled with the fact that the area—I don't think you could be swimming in the waters, per [102] se, and there were no docks in the area that are leased.

Q There are docks adjacent to it.

A Yes.

Q There are docks at Del Prado.

A Yes, there are docks all around, but not in this leased area.

MR. RICHMAN: Let me have this marked for identification.

THE COURT: 7-A for identification.

[Defendants' Exhibit No. 7-A was marked for identification.]

BY MR. RICHMAN:

Q In giving your opinion, you didn't think there was a market.

Are you aware that one of the plaintiffs, Mr. Coltun, bought because he could have a dock there?

A No, sir. You asked me that earlier and I have no knowledge of that point.

Q Well, the jury couldn't hear me earlier.

Let me show you what has been marked as Defendants' Exhibit 7-A for identification and ask you if you

can identify that as fairly depicting the site in the area with the exception of the construction that is taking place here since that was at an earlier time * * *

* * *

(Birnholz - cross)

[108] Q Whether it is not and rather under maintenance agreement to the various condominiums but is not open to the public, does that make any difference?

A From the standpoint of accessability.

Q And from the standpoint of the appraisal?

A Yes, I reviewed properties further in that roadway and my impression was that it was, in fact, a city street.

Q Did you also appraise the Biscayne Cove site?

A Yes.

Q Is the Biscayne Cove site another high rise condominium that is right there in the same location adjacent to it?

A Not immediately adjacent, in the same area lying to the east or the other side of the lake.

Q Within a quarter of a mile?

A Right.

Q When you appraised Biscayne Cove did you do it with all the amenities?

A Yes.

Q You would normally be appraising the unit with the facility and amenities the same?

A Yes, sir.

[109] Q In that sense, you reviewed the unit with the facilities and amenities as one packet?

A In that case I did, sir.

Q And Mr. Birnholz, as a practical matter in the normal circumstances whether or not there is a lease on the portion or let's just say there is a lease on all the recreation facilities, you are still going to appraise the condominium the same way as to the value to the buyer?

A If there is one lease covering all facilities, yes.

Q Would the appraisal be the same if the entire project had been under a ninety-nine year lease?

A Yes.

Q Would your appraisal be the same if nothing were under the ninety-nine year lease?

A Yes.

Q Would your appraisal be the same if some of it was under the ninety-nine year lease?

A No, sir.

Q Why not? What is the difference?

A In this situation, I consider the area leased to be almost superfluous to the entire project.

If one reviewed the photograph, it does [110] not show the recreational facilities available to the property owner at Commodore Plaza. It showed only a portion because it was at a different level. The pool was adjacent to a rather larger pool deck other people could use.

This pool area required going through a parking garage or down stairwells to that pool deck. It was not in the central area that one would associate with an amenities package.

Q If you had exactly the same package this condominium had and didn't have a ninety-nine year lease, wouldn't your appraisal be the same?

A I would then consider it on a different basis. I would then equate that entire facility with other units in that.

Q And you would basically review—

MR. PAGLINO: Objection. This is becoming argumentative.

THE COURT: Objection overruled.

BY MR. RICHMAN:

Q Mr. Birnholz, if you are telling us if you had Commodore Plaza with a large swimming pool and a small swimming pool exactly as it were built and there were no ninety-nine year leases, you would give the unit [111] a lesser value?

A That would not be my testimony.

Q Of course not.

A I would be in a position to compare it and arrive at a fair value.

Q When you do it for a comparative value, let's assume this is the condominium unit you are going to compare, the condominium and see if all the facilities are owned in fee simple—

A That's correct.

Q —let's assume this is the Commodore Plaza. Now, it wouldn't make one bit of difference in your ultimate appraisal, sir, if that portion, this entire portion, is a leased facility, a ninety-nine year lease as opposed to whether all of it were in fee simple.

All of the recreation facilities, I am asking you to assume are right in here.

MR. PAGLINO: Objection. Immaterial and not relevant.

THE COURT: Objection overruled.

THE WITNESS: If all of the leased facilities were under the same control, yes, I would consider it as one unit package.

* * *

(Birnholz - cross)

[113] Q What doesn't?

A It doesn't happen and if you carve it out, it is carved out as excess property.

Q You are telling me that that small swimming pool area isn't part of the same facility for the condominium unit owners?

Mr. Birnholz, to clarify one area of your testimony, do I understand you correctly to say that the market from '69 was a highly competitive market?

A It was reasonably competitive. I would have to know specifically when.

I originally told you I didn't know how many condominiums were available in the market place and I find I do have it now.

Q And your answer is, it was highly competitive?

A It was reasonably competitive.

Q As a practical matter, anybody entering into that market didn't have any economic advantage over anybody else; is that correct?

A I don't understand the question.

Q As an appraiser who has looked at units up and down the South Florida area, you have appraised condominium units, recreation leases and so forth.

[114] A Yes, sir.

Q You are not aware of anybody who had a particular economic power advantage?

A I don't think so. The market really dictates the competition, just things that are required to customers.

MR. RICHMAN: Subject to our right to recall after we get the deposition, I have no further questions of this witness.

THE COURT: Sir, when you are recessed today, leave your number and we will call you back, if necessary.

MR. PAGLINO: I have some questions.

REDIRECT EXAMINATION

BY MR. PAGLINO:

Q You have been examined for a long time by Mr. Richman.

Has anything he said changed your opinion?

MR. RICHMAN: Object to the form. There is no way to summarize all that testimony.

THE COURT: Objection overruled.

THE WITNESS: My opinion is it is the same as Quinlivan's value which is $33 a foot. I consider the leased area to be excess because it is [115] under separate control, as opposed to the original leased area— I am sorry, the original facility which is not leased, the common elements that the unit owners own is everything.

If there is a small portion that they don't own which is located where the exhibit is located, I would have to consider that to be superfluous and excess to the entire project.

MR. RICHMAN: Object to the form.

THE COURT: Enough of the narrative.

BY MR. PAGLINO:

Q The other pool and tennis courts, there is no lease, they own that?

A It is part of the common elements. They own the recreation facilities and all the things appended to it.

Q Mr. Richman showed you a portion of the lease. May I have that? That is Plaintiffs' 2. He showed you a portion of this lease. I am going to show you another portion, the signature page.

Can you tell what day that lease was signed? Are your eyes better than mine?

A On the 18th day of September in Nassau County in 1970.

• • •

(Birnholz - recross)

[127] • • • upstairs on the upper deck.

A Or converting the gazeboes to some function.

Q But as it presently exists, are there no places to change?

A Right, sir.

Q All out in the open?

A Yes, sir.

Q And there is really no market for something the way it presently exists?

A That is precisely why I stated earlier that my conclusion is that it should be treated only for land value.

MR. RICHMAN: No further questions.

MR. PAGLINO: Just one.

REDIRECT EXAMINATION

BY MR. PAGLINO:

Q Are you familiar with the Jockey Club?

A Yes.

Q Do you know the pool there?

A Yes.

Q No changing facilities?

A No, they go to the main facility.

Q That is a commercial enterprise that • • •

• • •

(Morgan - recross)

[355] RECROSS EXAMINATION

BY MR. RICHMAN:

Q Mr. Morgan, there was some questions raised yesterday concerning frankly your competency with regard to your project.

I want to ask you what kind of project did you have at the end of 1969 that caused escalation costs.

Did you have labor problems, for example?

A The problems that we had throughout the Florida area consisting of labor problems, poor sales, accelerated costs where contractors were not living up to their contract because of price increases, labor increases.

Q What did you have to do when subcontractors did not live up to their contracts?

A In the instant case we were involved, the contractors were so far into the job that we had to finance beyond the scope of the original contract price that we had agreed to in order to have them continue.

Q Were there also labor problems?

A There were strikes. There was a plumber's strike.

• • •

(Cohen - direct)

[394] • • • idea or the pricing idea?

A Neither. What came first was an evaluation of the market.

Q In the evaluation of the market, did you come to a decision on how much you would have to price your units at in order to sell them without a lease? Did that ever come up?

A Yes.

Q How much was that price?

A Mr. Morgan had constructed a condominium prior to our construction without a ninety-nine year lease.

Q How much was it?

A Excuse me, through his evaluation and difficulties he had in that operation, he recommended and I ratified that we go with a ninety-nine year lease and be competitive.

Q My question was, how much was the price which apartments would have had to sell for without the ninety-nine year lease?

A In my judgment, it would have been some ten to fifteen percent, perhaps fifteen percent more.

Q So if an apartment was selling for $33,000, you are saying it would have had to sell for * * *

* * *

(Cohen - cross)

[474] * * * still bound by the ninety-nine year lease. It still had the obligation to meet these payments.

But now if you started your litigation, you had a real problem because it was not seven acres, but .46 of an acre.

As a result, there was no litigation and as far as the developer and the Condominium Association, there has been just one litigation.

Q As a practical matter in terms of what you were representing in selling to the general public, your pricing of the units and pricing of the lease in terms of what it charged per unit was essentially the same?

A Identical.

Q And the only difference was how you carved it up within the project?

A That is correct.

Q Mr. Cohen, let me take you back before I get into other specific questions so the jury will have a little more knowledge in terms of your background.

You had indicated you were primarily in the garment industry.

Will you tell the jury briefly what your * * *

* * *

(Cohen - cross)

[504] * * * First Federal of Miami and I gave them some ideas and they liked the ideas and they indicated that if I could start to exert a little more interest in the project and help Mr. Morgan, and under certain circumstances, cross collateralization and even putting in certain moneys or liquidating certain assets to create moneys, that they would go along because they were very fearful of the market condition.

Foreclosures had started and customers were losing their deposits throughout the community and the savings and loan association had a tremendous stake in the community and they wanted very desperately to prevent what they called the domino effect.

But even more practically, had they foreclosed in the project in the state it was in, there were some preliminary estimates that it would take them over six million to get the project started and they would have a further loss.

So the best thing they could do was keep the project alive. Apparently I appeared as a good merchant because I certainly didn't know anything about building at that time.

Under these circumstances, they gave us cooperation and that is where we stood at that period of * * *

* * *

(Parra - direct)

[561] * * * involved.

"Q. You, personally?

"A. No, not me personally.

"Q. You also mentioned a condominium on 79th Street in Miami Beach. Did that also involve Mr. Paglino in it?

"A. Yes.

"Q. Do you know why you are here exactly?

"A. Yes.

"Q. Why is that?

"A. Well, I am here to render an expert testimony as to the impact on interstate commerce of the recreational lease which is a subject matter of the entire proceeding.

"Q. But it bore no relationship to that particular area, your prospective testimony?

"A. Not for the Century 21. We are familiar with the general neighborhood where the property is located. We are familiar with general trends in the condominium market in the South Florida area, particularly the South Florida area.

"Q. And your familiarity was because of your report on the unconscionability issue and not because of any expertise that you hold out with regard to • • •

• • •

(Parra - direct)

[563] "A. Well, it involves activities in the field of sports, entertainment, events, and private clubs that are constantly being organized for the benefit of members to engage themselves in the leisure time activities. And there is an entire industry that has developed around this concept of leisure time, in South Florida in particular because of its competence as a resort area within the state and within the county.

"It tends to have a higher incidence of recreational activities than other areas in the state, and it is commonly

known that tourism, recreation and leisure time activities form one of the main stays of the county's economic base.

"Q. In your role as an economic analyst, have you ever determined what percentage of products or goods utilized in the South Florida area come in from other states?

"A. We have studied some generalized statistics, and we have determined that Florida, particularly South Florida, because of the low incidence of manufacturing development within the state, tends to be a net importer from the states. In other words, more goods flow into the state than are exported from the state of Florida to the United States."

* * *

(Parra - cross)

[584] * * * it is for recreation or relaxation.

"Q. Mr. Parra, as a matter of fact, you have testified that Century 21 Commodore Plaza the people don't even use it for—excuse me, sir. Let me finish my question—don't use it for recreational purposes, by and large. They basically don't even need it. They have the main facilities already, right, sir?

"A. Right."

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"Q. Nobody at Commodore Plaza is prevented from using the Commodore Plaza recreational facilities by virtue of the fact that there is a lease over a small swimming pool. They can still use the large pool and all the other facilities?

"A. No. I assume there is a low frequency of usage of the secondary pool because they already have a bigger pool on the upper deck.

"Q. Then in that sense people at Commodore Plaza, because they already have the large pool, are not really a very good prospect for anybody else in the South Florida area who has a swimming pool and who wants to offer swimming pool services, are they?

"A. No, sir."

MR. PAGLINO: Your Honor, there was more

* * *

* * *

(Parra - cross)

[588] "Q. Okay. From the standpoint of any kind of competition, though, so we know where we stand on that, there really is no ongoing competition, so to speak, between a ninety-nine year lease at Aventura and a ninety-nine year lease at Century 21, is that right?

"A. I think that the ninety-nine year lease at Century 21 could not compete against any other leases."

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"Q. Mr. Parra, you have made no study at all to determine whether or not the people at Commodore Plaza got a reduced purchase price on their apartments because of the fact there was a lease at that facility as opposed to selling them the whole thing, including the recreational facility in fee simple, right, sir?

"A. No, I did not make a study of that."

Page 214 at the bottom.

"Q. Point East, for example, are you familiar with the fact that some condominiums at Point East which were built and marketed in the middle to latter 1960's, let us say the last one was 1968, having been resold while sub-

ject to the ninety-nine year lease, had a price equivalent to two or three times their original purchase price?

"A. It is possible.

[589] "Q. To put another point at rest, Mr. Parra, the four hundred thousand dollars that you are talking about roughly per year that is collected on the lease has increased from about two hundred and thirty five thousand dollars a year because it was a cost of living indebt, right, sir?

"A. Right, based on the escalation clause.

"Q. And the purpose of having a cost of living index within a lease is to preserve the purchasing power of the dollars to the leasor, to ensure the dollars that the leasor is getting each year remains substantially constant, right, sir?

"A. That is the concept behind the escalation clause.

"Q. And that is a very valid concept in commercial leases. For example, it is very common in the commercial leases that you reviewed when you were with the mortgage company, for example?

"A. It's a standard operating procedure in the drafting of long term leases, certainly.

"Q. Now, with respect to the particular facility of Commodore Plaza, from the standpoint of view of the purchaser at Commodore Plaza, would it make any difference at all to the purchaser economically—we are [590] talking about real estate economics—any difference at all to the purchaser if all of the recreational facilities of Commodore Plaza were under the lease or if only one small swimming pool is under the lease where he is paying the same price for his purchase—for his apartment, rather, and he is paying the same amount monthly on his lease? Any difference?

"A. Would there be any difference to the purchaser?

"Q. Yes, sir, for the consumer, any difference at all to him under the two hypothetical situations.

"A. Well, this is not a hypothetical situation. You are asking me a question of fact.

"Q. I am asking you a hypothetical question, sir.

"A. No."

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"Q. Mr. Parra, to clarify one question that the Court asked earlier, if a purchaser were coming down to purchase in the South Florida area and he were deciding between, say, Century 21 and Aventura, for example, that offered Condominiums both with ninety-nine year leases, and the purchaser was comparing the two facilities between the two, is it your experience that * * *

* * *

(Parra - cross)

[593] * * * pocket to use for whatever he wants to, such as leisure time activities?

"A. I think that taken, as a whole, all the projects do have an impact on the market. Aventura specifically, it would have to be the subject of a specific study to see to what extent the people who reside there would be prone to join other clubs or avail themselves of other types of recreational goods or facilities.

"Q. You have made no such study, right?

"A. No, not in Century 21. We have made them for Buckley Towers, as I stated previously."

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"Q. If a person goes ahead and pays more money out of his pocket because he is buying the capitalized value of the lease, then he also has less money for the leisure time market or for other activities, right?

"A. Right.

"Q. So as a practical matter the effect is basically the same both ways, right? Essentially the same?

"A. I don't know, really.

"Q. Okay, sir. I will accept your saying you * * *

* * *

(Parra - cross)

[596] "BY MR. RICHMAN:

"Q. You are not familiar with the act that subsequent to that, the legislature passed Florida Statute 711.121 that allowed condominium associations to go ahead and lease facilities to, in effect, accomplish the same thing? You don't know that, do you, sir?

"A. No, I don't.

"Q. But to make sure I am clear on that point with regard to a fee simple piece of property and a leased piece of property, where the two are together—forget about condominiums, but that kind of situation, if you submitted that for review while you are with your mortgage company, you view that as a package deal, right, sir?

"A. Right.

"Q. And there was nothing anticompetitive by virtue of the fact that that is the way it was submitted?

"A. No.

"Q. Or by virtue of the fact that instead of paying all of the money for the piece of property in fee simple,

a part of it was paid for the property in fee simple and a portion of the moneys were paid over a ninety-nine year lease. There is nothing anticompetitive about that, is there, sir?

[597] "A. No.

"Q. Nothing that would adversely effect any market that you know of anywhere, right, sir?

"A. Right."

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"Q. Mr. Parra, actually made no study in this case as to whether or not the sale of the condominium units here and the lease here had any particular impact on commerce, did you, sir?

"A. Not a specific study. The statements I have made are based on past analyses and studies that we have made, not relating to Century 21.

"Q. You never made any study at all with regard to Commodore Plaza, sir, for example, as to how much money for the purchase of the units offer anyone who came from out of state, did you, sir?

"A. No.

"Q. And, conversely, you never made any kind of study as to how much came from local people, right, sir?

"A. Right.

"Q. And you never made any kind of study as to how much of the income from the purchasers at Commodore Plaza comes from out of state to pay the [598] income stream that goes into the payment of the leased facility, right, sir?

"A. Right.

"Q. And you never made any kind of a study specifically to determine how much of that two hundred and thirty five thousand dollars a year originally or four hundred thousand dollars a year now would, in fact, have been used or would even likely have been used for any particular leisure time activities, right, sir?

"A. I did not."

Skipping all the way to 238.

"Q. To conclude, there is nobody anywhere offering facilities at that particular site where the leased area is, right, sir, in the sense that the site itself—okay. Let me clear the basis of my question—that the site itself, because it is real estate is unique, right, sir? The particular site for the particular location in proximity to Century 21 cannot be duplicated?

"A. It is unique?

"Q. Yes, sir.

"A. It is unique.

"Q. Okay, sir. And in that sense a leisure time activity company, whatever it is, whether it is local or whether it is interstate commerce, is not in a * * *

* * *

(Parra - cross)

[600] * * * been in a much better position to give you more specific answers, but you must understand that this is not the only assignment on which I work.

"Q. I understand.

"A. And I would have needed more time. It was not professionally negative.

"Q. I am not suggesting it was, but I am saying to you, and you agree with me, that that is what you would have preferred to do?

"A. Certainly.

"Q. Okay. Now, can you identify any entity in this leisure time industry, as you referred to it, that has been affected by virtue of the existence of the lease at Century 21?

"A. No."

Page 247.

"Q. Mr. Parra, it is true, is it not, that the leisure time activities, the alleged leisure time activities that you have testified to that may be affected by virtue of the lease in this case could be totally and wholely affecting intrastate as opposed to interstate commerce, could they not?

"A. It is possible."

MR. RICHMAN: That is all I have.

(Lewis - direct)

[635] * * * testified only on behalf of unit owners or only on behalf of the developers on the issue relating to the recreation leases?

A. No. I have testified for both. I worked on seventeen cases concerning recreational leases and at least four of those I have worked for the attorney representing the condominium unit owners and the other thirteen I have worked for the attorney representing the developer.

Q. When you first got into the field relating to recreation leases or the study of them in the state of Florida, did you have any questions in your mind as to whether

or not the use of the lease was a proper financing or marketing device?

A. The truth is I assumed it was an evil that was ripping off the consumer, and I went in as a consumer advocate expecting to show exactly that, and my research just really opened my eyes to the fact there is confusion. It is a difficult instrument. There is no question about that. It is an economically complex area.

Q. What was your bottom line?

A. My bottom line is the recreation lease is a financing and marketing device that is used, has been used in all cases I have seen to allow the developer to [636] better compete in a very competitive South Florida market, and to lower the initial front end cost to the consumer, and to broaden his market by doing this, and I think importantly to defer some profit for him over a future period which has some tax implications.

Q. Is that a valid economic goal on the part of the developer?

A. Certainly.

Q. You mentioned also I believe in your studies the size varied greatly and that raised some questions in your mind besides, in other words, the amount of the facility or nature of the facility covered by a lease. What did you conclude with regard to that variation?

A. It is hard to see this, but it is clear to me I mean all the evidence suggests that the amount of the facility on the recreation lease are undoubtedly irrelevant to the device and it is important, but the recreation lease is a profit center for the entire project.

There is a condominium project. It is the condominium unit that the person sleeps in and eats in. It is the

common area he walks in. It is the recreation facility he relaxes in. That is it. The * * *

* * *

(Cohen - direct)

[748] * * * business in New York?

A. Yes. I had experience in sales and was considered rather pretty good in marketing. I certainly did not have construction experience at the time I came down to this community.

Q. With regard to the Commodore Plaza, itself, your projected plans, could you just tell the Court with regard to the corporation, Saul J. Morgan Enterprises, in round terms, what was the loss on the construction of the units?

MR. PAGLINO: Two objections.

MR. RICHMAN: To the sales of the units.

MR. PAGLINO: Leading. There is no predicate.

THE COURT: Overruled on the grounds stated.

THE WITNESS: The sale and construction aspect of the Commodore Plaza Condominium resulted in a 4.2 million dollar loss.

MR. RICHMAN: I have no further questions.

THE COURT: Cross.

CROSS EXAMINATION

BY MR. PAGLINO:

Q. Where are the documents supporting this * * *

* * *

(Moskowitz - direct)

[762] He told me that was out of the question. It was ridiculous, so he says, "I will tell you what. We will split it. Pay me thirty-six five," and that is what I paid. That is what really happened.

Q. With regard to the condominium association, you ran the condominium association, itself, for a number of years, correct?

A. No.

Q. Were you president of the condominium association for several years?

A. No. Two years.

Q. Only two years total?

A. Total.

Q. Were you on the board of directors for a number of years?

A. Yes, I was.

Q. As a matter of fact, you actually were paid to manage the association, were you not, for some time?

A. No. I was not. Where do you get I was paid? You show me.

Q. Mr. Moskowitz, was there a period of time you acted as the manager of the condominium association?

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[773] • • • rather extensive and it will be necessary for us to use a considerable period of time. I will give you until one o'clock for lunch. Same instructions and admonishments I have given you before. You will be in recess until one o'clock.

[Jury left the courtroom and the following proceedings were had:]

THE COURT: At the conclusion of all the testimony, Defendant have any motions?

MR. RICHMAN: Your Honor, I would renew the same motions.

THE COURT: Any additional grounds?

MR. RICHMAN: The only additional grounds is by the testimony of Mr. Moskowitz, he, in fact, has shown that he shopped in the market with regard to him as a plaintiff, and there could not be any question he has not proved of the substantive elements.

THE COURT: Any additional grounds?

MR. RICHMAN: Only the additional testimony of Dr. Lewis.

THE COURT: No additional grounds.

MR. RICHMAN: No.

THE COURT: I will reserve ruling on the motion. I have serious reservations about the sufficiency of the evidence but I will submit it to the jury.

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